McKenzie Engineering Co. *and* Northwest Illinois and Eastern Iowa District Council of Carpenters, affiliated with the International Brotherhood Of Carpenters and Joiners of America, AFL–CIO. Case 33–CA–12098

April 10, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 24, 1998, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

The judge found, as alleged in the complaint, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to honor its 8(f) collective-bargaining agreement with the Northwest Illinois and Eastern Iowa District Council of Carpenters (the Carpenters Union) with respect to its work on the Crescent Bridge repair project.[3] We adopt this finding. It is well settled that an employer may not repudiate an 8(f) agreement during its term.[4] Additionally, when an employer consents to be bound by an area 8(f) agreement and its successor agreements, as the Respondent did here, the employer's contractual obligations continue, absent timely notification to terminate the agreement and to withdraw delegated bargaining authority.[5]

The Respondent performed repair work on a structure under the Crescent Railroad Bridge on the Mississippi River from early December 1996 until March 26, 1997. The structure under repair, called a "Sheer," protected a pier under the bridge from collisions by vessels or debris in the river. Beginning in December and repeatedly during the course of the repair work, Carpenters Union representatives requested the Respondent to honor its 8(f) collective-bargaining agreement with the Union regarding nonpower equipment-related work on this project. The Respondent, however, did not honor the collective-bargaining agreement. To the contrary, on February 5, 1997, the Respondent contacted a representative of a different union, International Union of Operating Engineers Local 150, and signed an addendum to its existing Dredge Maintenance Agreement with the Operating Engineers making that agreement applicable to all work involved in the Crescent Bridge project, not limited to dredging work. Thereafter, the Respondent regarded all its employees on the Crescent Bridge project as being covered by its agreement with the Operating Engineers, and it continued to refuse to honor its collective-bargaining agreement with the Carpenters Union.

We agree with the judge, for the reasons he stated, that, by virtue of a memorandum agreement that the Respondent signed with the Carpenters in 1988, it was bound by the 1996–2001 heavy and highway construction contract between the Associated General Contractors of Illinois and the United Brotherhood of Carpenters and Joiners of America and that this agreement was applicable to the Crescent Bridge repair project. The judge found that the contract covered work not involving the operation of power equipment and tasks incidental thereto. Thus, the judge found that work covered by the contract clearly included, for example, such work as placing fence timbers into position and connecting them to each other. He further found that the contract's work jurisdiction provisions supported the Carpenters Union's contention that the contract also covered work connected with fabrication of cells and erection of the steel structure on the downstream side of the Sheer.[6] We agree that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to honor this collective-

[1] The Respondent also filed a letter on June 30, 2000, seeking to call the Board's attention to a recently-issued court decision, *Carpenters Fringe Benefit Funds of Illinois v. McKenzie Engineering*, 217 F.3d 578 (8th Cir. 2000). The Board's associate executive secretary rejected the letter as argument submitted beyond the period allowed for filing briefs but forwarded the court decision to the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Under Sec. 8(f) of the Act, it is generally permissible for an employer engaged primarily in the building and construction industry to enter into an agreement with a union covering employees in that industry even though the status of the union as the majority representative of those employees has not been established and the employees who will be covered by the agreement have not yet been hired. See *Iron Workers Local 3 v. NLRB*, 843 F.2d 770, 773 (3d Cir. 1988).

[4] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, supra; accord: *NLRB v. W. L. Miller Co*., 871 F.2d 745 (8th Cir. 1989) (affirming *Deklewa* rule).

[5] *Cedar Valley Corp*., 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993).

[6] The judge also provided that, if it was determined during the compliance phase of this proceeding that a particular task or tasks were not encompassed by the contract, the remedy could be tailored to accommodate that determination.

bargaining agreement with respect to the Crescent Bridge project.

The subsequent decision of the U. S. Court of Appeals for the Eighth Circuit in *Carpenters Fringe Benefit Funds of Illinois v. McKenzie Engineering*, supra, to which the Respondent has directed our attention, does not compel a contrary result. In that case, the Carpenters Fringe Benefit Funds of Illinois (the Funds) sued the Respondent here under ERISA[7] to recover unpaid pension fund contributions relating to the Respondent's work on the Crescent Bridge repair project as well as an additional project (the Keokuk Dam repair project), and Carpenters Union Locals 166 and 410 sued to recover unpaid union dues and other benefit fund contributions under Section 301 of the Labor Management Relations Act[8] relating to the same projects. The district court granted judgment for the plaintiffs. On appeal, the Eighth Circuit reversed. It found, as did the judge here, that the Respondent had signed a memorandum of agreement under which it agreed to be bound to certain multiemployer collective-bargaining agreements with the Carpenters Union and that such an agreement covered the geographic area that included the Crescent Bridge project.[9] The Eighth Circuit, however, further found that "the Funds failed to prove that the applicable collective-bargaining agreements required [the Respondent] to pay the amounts claimed in the audit and the Carpenters [locals] failed to exhaust remedies under those agreements."[10]

The Eighth Circuit's dismissal of the Funds' ERISA claims was premised principally on a failure of proof. Those claims were based on an audit of the Respondent's payroll records. The Respondent's obligation to pay benefit fund contributions accrued according to the number of hours worked by employees covered by the contract. The auditor based his calculations of contributions that the Respondent owed on the assumption that the Carpenters Union's contract covered all hours worked by all the Respondent's employees except hours for which the Respondent had made contributions to another union's pension fund. However, the audit report stated that the auditor could not verify the work performed by any of the individuals whose hours of work were used as the basis for computing the Respondent's fund contribution liabilities. As the Respondent had contracts with several unions, the Eighth Circuit found that there was "no basis to assume that every employee on every McKenzie project"[11] was covered by the Carpenters Union contract. The court therefore found that the assumption on which the auditor calculated the Respondent's liability for fund contributions was unwarranted. The court specifically found erroneous the audit report's inclusion of certain hours of work, because, for example, the hours of work were performed in the wrong year or by employees not shown to have worked on the projects in question.

Additionally, in dismissing the Funds' claims, the Eighth Circuit also concluded that the "record [would] not support a finding that any Crescent Bridge work was covered by a collective-bargaining agreement with the Carpenters, as opposed to the Operating Engineers."[12] Its basis for this conclusion was that the Respondent "had an ongoing relationship with the Operating Engineers in its home territory of Fort Madison and Keokuk [and] was certainly free to expand that relationship to include [the Crescent Bridge] project in the Quad Cities territory."[13] Thus, in the court's view, the fact that the Respondent had sought out a collective-bargaining agreement with the Operating Engineers after the Carpenters had claimed the Crescent Bridge work was "irrelevant."[14] The Respondent, according to the court, "was contractually free to assign the Crescent Bridge work to either union, or part of the work to each union."[15] Further, the court found that any union aggrieved by the Respondent's assignment of the Crescent Bridge work "could invoke the interunion jurisdictional dispute procedure," and, because Carpenters Local 166 had not done so, "the Funds [were] not entitled to contributions for work assigned to members of a competing union."[16]

Finally, the Eighth Circuit also rejected the local unions' claims for fund contributions and dues. It found that their claims for fund contributions were based on the same audit report calculations of employee work hours that the court had already found faulty. Additionally, the court sustained the Respondent's defense that the local unions' Section 301 claims were barred by the unions' failure to exhaust the collective-bargaining agreement's arbitration remedy.

We find that the court's reasons for dismissing the lawsuit are not applicable to the present proceeding. The grounds on which the court dismissed the Funds' and the local unions' claims under ERISA and Section 301 were based in large measure on the record in that case and the

[7] Employee Retirement Income Security Act of 1974, 29 U.S.C.A.§1001 et. seq.

[8] 29 U.S.C. § 185.

[9] The Respondent did not dispute the plaintiffs' contention that it was covered by the contract.

[10] 217 F.3d at 580.

[11] Id. at 583.

[12] Id. at 584.

[13] Id. at 584–585.

[14] Id. at 584.

[15] Id. at 585.

[16] Id.

particular elements of proof necessary to establish violations under those statutes and, as such, have no application in the instant unfair labor practice proceeding. Thus, while the auditor's report calculating benefit fund liabilities was central to the lawsuit, it has no relevance to and was not introduced in the present unfair labor practice proceeding, which concerns the General Counsel's complaint allegation that the Respondent failed and refused to honor its collective-bargaining agreement with the Carpenters Union. Consequently, the shortcomings that the court found with the Funds' auditor's report, as well as other failures of proof in that case, are irrelevant to the present proceeding.

Additionally, while the court upheld the Respondent's defense in that case that the local unions had failed to exhaust the contractual arbitration procedure, the Respondent raised no such defense in the present proceeding. As deferral to arbitration procedures is an affirmative defense, it is waived if not raised.[17] Accordingly, the defense of deferral to arbitration is not before us.

Finally, whatever the Respondent's obligations under ERISA may be, we find that, under our statute, the Respondent had no right to refuse to honor its collective-bargaining agreement with the Carpenters Union merely because it entered into an overlapping collective-bargaining agreement with the Operating Engineers. The Seventh Circuit rejected such a contention in *NLRB v. Howard Immel, Inc.,* 102 F.3d 948 (1996). There it stated:

> Immel reasons that . . . [it] was entitled to repudiate its agreement with one of the 9(a) representatives because it had overlapping 9(a) agreements with two unions. However, no legal authority supports the proposition that an employer's actions in entering into two conflicting bargaining agreements alter the rights of a party to a 9(a) agreement. Indeed, the only authority that Immel cites recognizes that by entering into conflicting bargaining agreements an employer may have to pay two unions for work that only one performed. *Hutter Constr. Co. v. International Union of Operating Eng'rs*, 862 F.2d 641, 645 fn. 16 (7th Cir.1988). This reasoning suggests that an employer cannot escape its obligations under one collective bargaining agreement by claiming that those obligations conflict with its obligations under another agreement.[18]

Although the Carpenters Union's contract that the Respondent refused to honor was an 8(f) agreement rather than a 9(a) agreement as in *Howard Immel*, the outcome is no different. An 8(f) agreement, like a 9(a) agreement, is binding and enforceable during its term.[19] Further, as the judge noted, when an employer executes an 8(f) contract that binds it to renewals and to successive contracts, the employer is statutorily obligated to honor those renewals and successive contracts, unless and until it properly exercises its right to terminate at the end of a contract term.[20] As the judge noted, the Respondent failed to exercise such a right here. Accordingly, the fact that the Respondent chose to enter into an overlapping contract with the Operating Engineers does not relieve it of its obligation under Section 8(a)(5) of the Act to honor its contract with the Carpenters Union.[21]

Also, in our view, the Respondent's failure to honor its contract with the Carpenters Union cannot be excused by the fact that the Carpenters Union did not invoke a contractual interunion jurisdictional dispute resolution procedure.[22] As a threshold matter, there was nothing that could even remotely be called a jurisdictional dispute for the majority of the 4-month duration of the Crescent Bridge project. Only one contract—the Carpenters Union contract—covered the work in question from early December 1996, when the project began and the Carpenters Union made its initial demand that the Respondent honor the contract, to February 5, 1997, when the Respondent executed an addendum to its agreement with the Operating Engineers so that it would apply to the work in question. Thus, even assuming arguendo that the existence of a jurisdictional dispute would have altered the Respondent's obligation to abide by its contract with the Carpenters Union, there is no basis on which the Respondent can claim that a jurisdictional dispute existed at the time that the Carpenters Union first requested that the Respondent observe its contract with the Carpenters Union and for more than half the duration of the project.

Further, there was, in fact, no jurisdictional dispute—at least in the sense that is contemplated under the Act—because, even after February 5, there were not two competing claims for the same work. That is, neither the Carpenters nor the Operating Engineers demanded that the

[17] See *Hospitality Care Center*, 314 NLRB 893, 894 (1994); *Food Fair Stores v. NLRB*, 491 F.2d 388, 395 fn. 9 (3d Cir. 1974).

[18] 102 F.2d at 953.

[19] *John Deklewa & Sons*, supra; *NLRB v. W. L. Miller Co*., supra.

[20] See *Cedar Valley Corp*., supra.

[21] Cf. *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983) (employer's entering into conciliation agreement with EEOC did not relieve it from conflicting obligations imposed by its collective-bargaining agreement with union; a contrary result "would undermine the federal labor law policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." Id. at 771 (citation omitted)).

[22] In its references to such a procedure, the court apparently had in mind a voluntary procedure for settlement of jurisdictional disputes that exists in the construction industry. The Respondent introduced evidence regarding such a plan in the present case.

Respondent assign the work to different groups of employees. Rather, after February 5, the issue arose regarding which collective-bargaining agreement—the Carpenters Union contract or the Operating Engineers contract—should apply to the employees performing the work in question. As there were not competing claims regarding assignment of work to different employees, no jurisdictional dispute existed.[23] Moreover, the Respondent's conflicting contractual obligations arose only because it took the initiative to create such a conflict by seeking out and signing the addendum to its contract with the Operating Engineers. We agree with the judge's statement that the Respondent's signing of the addendum with the Operating Engineers was "no more than a very thinly-disguised attempt by the Respondent to avoid its collective-bargaining contract with the [Carpenters] Union." (Below at 867.)

Finally, the Carpenters' refraining from invoking a contractual interunion jurisdictional dispute procedure would not preclude the General Counsel from establishing that the Respondent committed an unfair labor practice by refusing to honor its collective-bargaining agreement with the Carpenters Union. Under the Act, an employer that fails to honor its collective-bargaining agreement during the agreement's term violates Section 8(a)(5).[24] There is no prerequisite that, if a contractual interunion jurisdictional dispute procedure exists, such a procedure must be invoked.[25]

Accordingly, we adopt the judge's finding that the Respondent's failure and refusal to honor its collective-bargaining agreement with the Carpenters Union with respect to the Crescent Bridge project violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Judith T. Poltz, for the General Counsel.
Davis & Campbell L.L.C. (Keith J. Braskich), of Peoria, Illinois, for the Respondent.
Marc M. Pekay, of Chicago, Illinois, for the Charging Party.

[23] See, e.g., *Safeway Stores*, 134 NLRB 1320 (1961) (no jurisdictional dispute within the meaning of Secs. 8(b)(4)(D) and 10(k) of the Act where there are not two competing claims for work in question).

[24] See, e.g., *Diversified Bank Installations,* 324 NLRB 457, 459 (1997), enfd. mem. 175 F.3d 1025 (8th Cir. 1999).

[25] See *Williams Enterprises,* 212 NLRB 880, 887 (1974), enfd. 519 F.2d 1401 (4th Cir. 1975), overruled in part on other grounds, *Brannan Sand & Gravel Co*., 289 NLRB 977, 980 fn. 12 (1988).

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Davenport, Iowa, on December 4 and 5, 1997. On April 29, 1997, the Regional Director for Region 33 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on February 11, 1997, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Sec 151 et seq. (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[1] on the briefs which were filed and on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. THE ALLEGED UNFAIR LABOR PRACTICES

Presented for resolution in the instant case is an alleged repudiation of a collective-bargaining contract, and the obligations imposed by it, arising under Section 8(f) of the Act. Involved is a project involving a structure in the Mississippi River beneath the Crescent Railroad Bridge, a single-track, crescent-shaped span extending between West Davenport, in Scott County, Iowa, and Rock Island, in Rock Island County, Illinois. That bridge was completed on January 8, 1990, and consists of seven through-trusses and a swing span, with a clearance of 26 feet MLW.[2] So that river traffic can pass the bridge, the swing span pivots horizontally, as opposed to the relatively vertical-type movement of a drawbridge. The swing span rests upon a masonry pivot pier, the base of which is on the river's bottom.

Obviously, an unprotected pivot pier is vulnerable to damage, should a vessel collide with it or should it be struck by river ice or other debris. To prevent such occurrences, a man whose last name was Sheer designed an island-like structure which has come to be referred to as a Sheer. It is essentially a rectangular structure, with the pivot pier centered in it, running parallel with the channel. One nose of the Sheer is upstream from the pivot pier; the other one is downstream from it. In consequence, a vessel which ventures too close, or river ice, and debris, will strike the Sheer, leaving the pivot pier undamaged.

That, in fact, happens not infrequently. As a result, damaged portions of the Sheer have to be periodically, apparently annually, repaired. It was repair work performed from early December 1996 until March 26, 1997, which has led to the charge and complaint in the instant proceeding.

Sheer repair is normally undertaken during the winter months when the river level is lower and there is minimal, if

[1] The General Counsel's unopposed motion to correct transcript is hereby granted. It should not pass unnoticed that those listed in that motion are not the only inaccuracies in the transcript. However, those inaccuracies are not so obscure that a reviewer would be unable to figure out what should have been reported. Accordingly, I shall not consume space correcting them, as well.

[2] See Costello, Climbing the Mississippi River Bridge by Bridge, Volume One, Costello (1995), pp. 112–113.

any, river traffic. For some winters preceding that of 1996–1997, that repair work had been performed by J.F. Brennan Marine Construction Company (Brennan). The contract for the 1996–1997 repair project, however, was let to McKenzie Engineering Co. (the Respondent) a Delaware corporation with an office and place of business in Fort Madison, Iowa. Respondent admits that, at all material times, it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. That ultimate admission is based upon the underlying admitted subsidiary allegations that, at all material times, Respondent has been engaged as a contractor in the business of marine construction and, in the course of those business operations during calendar year 1996, Respondent derived gross revenues in excess of $500,000, performed services valued in excess of $50,000 in States other than Iowa, and purchased goods valued in excess of $50,000 which it received at Fort Madison directly from points outside of the State of Iowa.

At specific issue in the instant case is Respondent's alleged contractual obligation to have continued recognizing Northwest Illinois and Eastern Iowa District Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union),[3] as the exclusive collective-bargaining agent of some employees who should have performed that 1996–1997 repair work on the Sheer, but for Respondent's asserted unlawful refusal to continue recognizing and bargaining with the Union. Given the fact that an understanding of that allegation is bottomed upon the type of work performed by employees represented by the Union, it is necessary to have some understanding of the Sheer and of the types of work performed to repair it.

Prior to Respondent's work on the Sheer, there was a dolphin which had been erected at its upstream nose. It consisted of creosoted timber pilings which had been bolted to each other and which rested on the stone surface of the river's bottom. Nailed to the outside of those pilings, facing the water, were one-fourth to one-half inches steel plates. The otherwise hollow interior of that dolphin had been filed with large rocks.

At the Sheer's downstream nose was a different type of dolphin: a steel home plate-shaped structure, resting on the river's bottom with steel sheeting nailed to its perimeter. The inside was reinforced by I-beams and H-beams tied together with wire rope and, also, with rock and some concrete.

Along both sides of the Sheer, extending over approximately 200-linear feet from dolphin to dolphin, were timber-pier protection fences. Each consists of a row of timbers which have been bolted together. Between the two rows of fencing wooden cross-bracing had been constructed, to provide support.

[3] During March 1997, the Union's name was changed to Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO. No motion was made to amend this case's caption. However, the remedial order should issue on the Heartland Regional Council's behalf, to reflect the name change. In that regard, it should be noted that there is neither contention nor evidence that the change in name had been anything other than that—that is, no evidence nor contention that the name-change had been but one aspect of an overall change which operated to change the Union, as an entity. Cf., e.g., *CPS Chemical Co.*, 324 NLRB 1018 (1997).

It is undisputed that when Brennan had performed repair work on the Sheer, the crews had consisted of employees represented by the Union and—to perform mechanical operations, such as boat- and crane-operation—of employees represented by Local 150, International Union of Operating Engineers (Operating Engineers).

Initially, Respondent successfully bid for reconstruction of the downstream dolphin, damaged apparently severely when a barge collided with it, and for replacement of damaged fence timbers. However, Burlington Northern Santa Fe Railroad officials liked the cell design submitted, to replace the dolphin, in that bid. So, following submission of an additional bid, included in the contract eventually executed was construction of cells to replace both the upstream and downstream dolphins. Also added was provision for steel reinforcing of the fences near the downstream cell.

Respondent began work on the Sheer during the workweek of December 9 through 13, 1996. Materials and equipment were transported by barge to the site. When work began, it was on the downstream nose. Cranes with clamshells—buckets which open and close—were used to clear the dolphin which was cut up with torches, transported by barge elsewhere and junked. Its rock- and concrete-fill was moved nearby, so that it could be reused as reinforcing fill for the cell, once fabricated. Riverbed obstacles were located and removed, again by means of cranes with clamshells. The template—a 5-ton, 28-foot-diameter steel circle—was floated in by barge and, after being hooked up, moved into place by crane to the location where the cell would be constructed.

Around that template was constructed the circular PS 20-inch pile cell. To accomplish that, 16-inch wide by 30 feet long flat pieces of metal piling, with tongue and groove anchorages on the ends, were lowered into position by crane and connected with each other, around the template, by means of a vibratory pile hammer. Once that had been completed, the template was removed by crane. The rock- and concrete-fill was returned, also by crane, from where it had been stored temporarily, following its removal from the dolphin. In the process, two reinforcing rings, with concrete crosses inside for added reinforcement, were positioned in the cell, one at waterline and the other at the cell's top. Bolted or spiked to the outer portion of the cell exposed to river traffic were rub timbers: rows of creosoted wooden timbers connected by cross-sections of wood and intended as an antisparking device and to protect the cell's metal piles from damage by anything which might otherwise strike the cell, itself.

The final step in completing the downriver cell was to connect it to the Sheer fences which, as stated above, extend approximately 200 linear feet along the outer sides of the Sheer, between the noses and their dolphins/cells. Those fences are made of creosoted timbers and, prior to Respondent's work on the Sheer, the area between those perimeter fences had been filled with timber cross-bracing, for reinforcement.

Respondent replaced that cross-bracing nearest the downstream cell with a steel structure. It was not connected to any of the internal cross-bracing, though some of that cross-bracing was cut away by Respondent when erecting the steel structure.

Still, rub timbers were bolted to that steel structure, at points where the Sheer's fences are adjacent to it.

The work performed to construct the upriver cell was essentially similar to that described above in construction of the downstream one. Thus, the timber crib structure there located was disassembled by removing the steel plating on the outside of the timbers, then using a crane-attached clamshell to remove those timbers and finally, removing the rock and stone which had filled the timber crib structure's interior. After ensuring that the river bottom was clear of obstacles, the template was placed by crane, the tongue- and groove-steel plate pilings were put in place, driven into the river's bottom and connected with each other. Once the template then was removed, the cell's interior was filled with the rock and stone removed when the crib structure had been disassembled, as well as with some newly purchased rock. In addition, concrete was poured for two reinforcing rings, with crosses inside, to provide added interior reinforcing, as was done downstream. Rub timbers were bolted or spiked to the outer portion of the cell exposed to the river.

No steel structure, like the above-described one fabricated downriver, was fabricated upstream. Instead, the Sheer fences were attached to the cell, so that their timbers interlocked with the cell's rub timbers, in the process replacing damaged and destroyed fence timbers. Respondent also replaced damaged and missing fence timbers at other points along the Sheer's two perimeter fences between the cells. For example, it replaced seven or eight fence timbers on one side of the Sheer near the bridge's pivot.

Neither the General Counsel nor the Union claim that the latter's collective-bargaining contract with Respondent encompassed all of the work performed on the Sheer between the first part of December 1996 and March 26, 1997. Thus, they acknowledge that the Union had not been entitled to represent employees who ordinarily operate power-driven equipment, such as boats and cranes, and who perform helper and maintenance work incidental to operation of such equipment. However, the Union, supported by the General Counsel, asserts that it should have been recognized as the collective-bargaining agent of employees performing nonpower equipment-related work performed by Respondent on the Crescent Bridge Sheer. And the origin of that assertion is a memorandum agreement admittedly signed by Robert J. McKenzie, Respondent's owner and president. Respondent admits that at all material times he has been a statutory supervisor and its agent.

McKenzie testified that at the time of commencing work on the Crescent Bridge Sheer, he had not been aware that he was bound to any collective-bargaining contract which would cover that project. However, he conceded that his signature does appear on a single-page memorandum agreement which, in part, states:

> THIS AGREEMENT is entered into between NORTHWEST ILLINOIS DISTRICT COUNCIL OF CARPENTERS: Boone, Bureau, Carroll, DeKalb, Henderson, Henry, Jo Daviess, La Salle, Lee Marshall, Mercer, Ogle, Putnam, Rock Island, Stark, Stephenson, Whiteside, Winnebago counties of Illinois; and Allamakee, Appanoose, Benton, Cedar, Clayton, Clinton, Davis, Delaware, Dubuque, Iowa, Jackson, Jefferson, Johnson, Jones, Keokuk, Linn, Louisa north of the Iowa River, Mahaska, Monroe, Muscatine, Scott, Van Buren, Wapello, Washington, and Wayne counties of Iowa, hereinafter sometimes referred to as the "UNION" and: (Print Firm Name) McKENZIE ENGINEERING CO. hereinafter referred to as the "EMPLOYER".

Robert J. McKenzie also acknowledged that he had twice printed Respondent's name on that document, as well as its address and telephone number.

There are certain additional aspects about that memorandum agreement which are significant, in light of contentions advanced by one or another party. First, numbered paragraph 2 of that agreement provides that, "The EMPLOYER recognizes the UNION as the sole and exclusive bargaining agent for and on behalf of the Employees of the EMPLOYER coming within the territorial and occupational jurisdiction of the UNION."

Second, as stated above, Robert J. McKenzie acknowledged having executed the contract, under the section for "EMPLOYER:" But, after that quoted word appears the following printed statement: "(If a corporation, must be signed by two officers.)" No other signature appears for Respondent and that omission is relied upon by McKenzie as the basis for his assertion, "that's not a contract."

Third, the date of "27 day of June, 1988" has been handwritten on the memorandum agreement executed by McKenzie. He testified, without contradiction, that he had not been the one who had handwritten that date on the agreement and moreover, that that date had not been written there at the time that he had executed it. Yet, he also testified that he did not recall how he had received that memorandum agreement, for execution, nor did he recall how he had returned it, after having executed it. In addition, it is uncontroverted, no signature for the Union had been on the contract at the time that McKenzie had executed it. On the memorandum agreement identified by McKenzie during the hearing, there appears the signature stamp of "E. E. Jacobsen." However, Jacobsen was never called as a witness, though there was neither representation nor evidence that he was unavailable to testify.

Fourth, as to what other contracts become binding on an "EMPLOYER" who executes that memorandum agreement, its numbered paragraph 4 states:

> The EMPLOYER and the UNION do hereby incorporate by reference and agree to be bound through their respective expiration dates by each of the Area Agreements in effect on the date of execution of this Agreement, negotiated between subordinate bodies of the United Brotherhood of Carpenters and Joiners of America and certain Employer Associations in counties of Illinois and Iowa which, of the effective date of this Agreement, make up the geographic jurisdiction of the Northwest Illinois District Council of Carpenters.

In addition, numbered paragraph 5 pertains to subsequent collective-bargaining contracts which also are incorporated by reference:

> FURTHER, the EMPLOYER and the UNION hereby agree to be bound by Area Agreements negotiated between the

> Northwest Illinois District Council of Carpenters and various Employer Associations for the period beginning with the expiration dates of the several Agreements referred to above and ending on the expiration dates of any successor Agreements thereto from time to time thereafter unless the EMPLOYER gives written notice to the UNION of a desire to amend or terminate any of such Agreements at least three (3) calendar months prior to the expiration of such Agreement or Agreements.

In connection with the fourth above-enumerated aspect, several collective-bargaining contracts were produced. One is a "MILLWRIGHT AGREEMENT" between ILLOWA Millwright Contractors Association, Inc. and Millwright-Technical Engineers Local Union 2158 of the United Brotherhood of Carpenters and Joiners of America, for a stated contractual period of June 1, 1978 through May 31, 1996, revised in June of 1993. It covers employees employed doing millwright work, as described in article I, section 3 of that contract, in several Illinois counties, including Rock Island south of Interstate 80 (a roadway which is north of the Crescent Railroad Bridge) and the eastern portion of La Salle County (in which the city of Marseilles is located), and in several Iowa counties, including Scott, Lee, and Jackson (in which the city of Bellevue is located). Also in effect during 1988 was a collective-bargaining contract between the Associated General Contractors of Illinois and the United Brotherhood of Carpenters and Joiners of America, covering highway/heavy construction for a stated period of July 1, 1985, through July 31, 1988. That contract covers work performed in Illinois counties, including Rock Island and LaSalle counties.

The significance of Marseilles and LaSalle County is that for June of 1988 Respondent made benefit payments, recorded on forms of Millwright Technical Engineers Local Union 2158, for two employees stated on that form to have been working for Respondent in Marseilles, Illinois. Like payments were made on behalf of those two employees working in Marseilles for the month of July 1988. For that same month, Respondent made payments to Carpenters Fringe Benefit Funds on behalf of two employees shown to have been working in Bellevue, Jackson County, Iowa. In addition, the form recording those payments, prepared by Respondent, shows that dues were checked off. In fact, McKenzie acknowledged that during 1988 Respondent had worked on projects in Marseilles, Illinois, and in Bellevue, Iowa.

Also produced were successive highway/heavy construction contracts between the Associated General Contractors of Illinois and the United Brotherhood of Carpenters and Joiners of America, one for the stated term of August 1, 1988, through July 31, 1991; another for the stated term of August 1, 1991, through July 31, 1996; and, of particular significance to the dispute at issue in the instant case, for the stated term August 1, 1996, though July 31, 2001. The latter is the contract which the General Counsel and Union contend applied to Respondent's December 1996 to March 26, 1997 Crescent Bridge Sheer project.

The "Work Covered" by article I, section A of that 1996–2001 highway/heavy construction collective-bargaining contract is:

> all work involved in the construction of roads, streets, alleys, highways, *railroad work*, airport runways, *bridges*, underpasses, overpasses, sidewalks, curbs, gutters, fences, guard rails, signs, landscaping, slope walls, retaining walls, and water lines when done in conjunction with highway work; dams, locks and dikes, boat slips, and ramps, and diving. Also including pump stations for locks and flood control, underground electrical and telephone systems and overland high tension transmission towers. [Emphasis added.]

As to the occupational scope of that contract, article I, section B is subdivided into three categories: Carpenters, Millwrights, and Piledrivers. As to Carpenters, the contract includes "all employees employed . . . in work coming under all classifications" which work at "the erection, fastening or dismantling of all material of wood, plastic, metal, fiber, cork and composition, and all other substitute materials." That provision continues by specifying particular types of work, including "installation of all piling for structures of all types whether wood, metal, or concrete;" "installation of sheet piling and bracing of same;" "removal of all materials pertaining to Pile Drivers work;" "fabrication, erection . . . of all concrete forms whether of wood, metal, or composition materials for structures of all sorts;" and, "handling and unloading of materials related to" such work.

The contract recites also that piledrivers work encompassed by it includes "the driving and removal of all steel piling"; "the loading, unloading and distribution of all piling"; and, "signaling of all cranes, gin poles, machinery and/or equipment pertaining to piledriving work, pile threader, and all other work hereafter awarded to Piledrivers." The contract states specifically that its geographic scope embraces Rock Island County, Illinois.

In the final analysis, there really is no dispute about the fact that some of the work on the Crescent Bridge Sheer between December 1996 and March 26, 1997, had been encompassed by the occupational scope of work recited in that 1996–2001 collective-bargaining contract: pile driving, replacement of timbers, construction of forms for concrete pours, for example. On the other hand, as discussed in section II, infra, neither does there appear to be a dispute about the fact that such work also could have been performed by employees represented by Operating Engineers.

In an effort to create a link between the memorandum agreement which McKenzie executed during mid-1988 and the 1996–2001 highway/heavy construction contract, the General Counsel produced, as evidence of observance by Respondent of the above-listed highway/heavy construction contracts between those dates, records of contributions made by Respondent to benefits funds after 1988. However, those records are not so conclusive as is portrayed. In the first place, none of them show that any contributions recited had been paid for work performed in any of the above-named Illinois and Iowa counties listed in the memorandum agreement which McKenzie had executed in mid-1988.

To the contrary, secondly, of those which do list a county in which a project was performed, all of those projects were performed in Lee County, Iowa, or one of the municipalities located within that Iowa county. However, Lee County is not one of the Iowa counties specified in the memorandum agreement executed by McKenzie.

To be sure, thirdly, the 1978 through 1996 "MILLWRIGHT AGREEMENT" does encompass Lee County, Iowa, as mentioned above. Yet, that collective-bargaining contract had been in existence by the time that McKenzie had executed the Union's memorandum agreement. But, that memorandum agreement makes no mention of Lee County, Iowa. Given those facts, and the absence of some other evidence—even an indication–that the memorandum agreement's geographic jurisdiction extended to counties other than those set forth in it, there is no basis for even inferring, much less concluding firmly, that Respondent had been bound by the entire geographic area of an incorporated by reference collective-bargaining contract to the extent that the latter's geographic scope exceeds that of the memorandum agreement actually executed. The best that can be concluded, given the totality of the evidence presented, is that incorporated contracts are applicable to Respondent only to the extent that they cover Illinois and Iowa counties enumerated in the memorandum agreement.

Fourth, obviously Respondent did make those contributions, which raises the logical question of why it had done so, had it not been obliged to make them under some collective-bargaining contract. In fact, for Lee County specifically, as well as certain other southerly Iowa counties, Respondent was bound to a separate collective-bargaining contract: one executed with the Union acting "for and on behalf of" Carpenters Local 410, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Local 410). That particular contract is described in my decision in *McKenzie Engineering Co.*, JD-117-97 (July 7, 1997), pending resolution by the Board on exceptions.

That contract excludes specifically "work under Highway and Heavy, Residential, and Millwright contracts," and, as pointed out on page 6 of that decision, "The parties stipulated that Respondent has not delegated bargaining authority to any other association or individual to sign the Heavy and Highway Construction Agreement," and moreover, "that Respondent has not signed that agreement." In consequence, with regard to Lee County, Iowa, and the other counties listed in its contract with Local 410, the General Counsel has conceded that Respondent is not party to a highway and heavy collective-bargaining contract, such as those to which it became party, through incorporation by reference, in more northerly Iowa counties and those in Illinois which are listed in the memorandum agreement.

Fifth examination of many of the forms accompanying Respondent's benefit contributions reveals that a number of them contain the legend "LOCAL #410 COMMERCIAL," or words to that effect. By its terms, the word "COMMERCIAL" would seem to imply something other than highway and heavy construction work. At least, there is no evidence equating one to the other. On many other forms appear the words "LOCAL #166 COMMERCIAL/JRNYMAN," or words to similar effect. Local 166 is located in Rock Island, Illinois, within one of the counties listed in the memorandum agreement which McKenzie executed during 1988. Yet, use of the word "COMMERCIAL," as part of that insertion, would appear to be inconsistent with highway or heavy construction work. More significantly, the few project locations which do appear on those forms for Local 166-represented employees—those of June through December, 1990; of April 1991; and, of October through December, 1993—all list Lee County, or a location within it, for the project on which the covered work had been performed.[4] None of the forms show a location within one of the memorandum agreement's listed counties. Accordingly, the best that can be inferred is that such contributions had been made on behalf of a traveler: an employee-member of Local 166 working in Lee County. It simply cannot be concluded that any of those contributions had been made pursuant to the memorandum agreement and its incorporated collective-bargaining contracts, as opposed to the separate collective-bargaining contract to which Respondent was a party with Local 410.

On the other hand, neither has there been a particularized showing that, between fall of 1988 and December 1996, Respondent had worked on any project located within any of the Illinois and Iowa counties listed in the memorandum agreement. As a result, lack of evidence regarding compliance with contracts incorporated by that memorandum agreement could merely reflect a lack of opportunity to have done so during that somewhat more than 6-year period. In fact, McKenzie testified that most of Respondent's projects are in the Lee County area.

Beyond that, there is no evidence that Respondent ever availed itself of the opportunity afforded by the memorandum agreement's above-quoted fifth numbered paragraph: no evidence that prior to the workweek of December 9 through 13, 1996, it ever had given "written notice to the UNION of a desire to amend or terminate any of such Agreements at least three (3) calendar months prior to the expiration of such Agreement or Agreements."

Turning to what occurred at the Crescent Railroad Bridge once Respondent commenced working on the Sheer there, Heartland Regional Council Business Agent Paul Delcourt testified that, on December 12, 1996, he had been asked by a union member who it was that was working at the Crescent Bridge. Delcourt further testified that he had contacted a Laborers' union representative who had said that he thought that it was Respondent who was setting up to perform that work. Delcourt decided to go to the site. But, before doing so, he affirmed in the instant proceeding his testimony in a deposition, taken in connection with a proceeding in Federal District Court, that he had checked to ascertain if Respondent was party to a collective-bargaining contract with the Union. According to Delcourt, it was then that he learned about the memorandum agreement which McKenzie had executed during 1988.

[4] No solace is provided for the General Counsel and Union by the form for May 1990. True, it lists Richard Parker as "H & H #2/JRNYMAN." But, it also states that the project involved had been located in the City of Keokuk, in Lee County, Iowa. Thus, it had not been a project covered by one of the counties enumerated in the memorandum agreement executed by McKenzie.

Delcourt went to the Crescent Bridge Sheer project, accompanied by a Laborers' business agent, on that same day, December 12, 1996. There, they spoke with McKenzie. It is essentially undisputed that the Laborers' agent, Butch Downs, asked if Respondent had any laborers working on the project, saying that Respondent had a contract with the Laborers Union. McKenzie replied that Respondent would not be needing laborers on that project.

Delcourt testified that he then said to McKenzie "that he had a contract with Carpenters, that if he had any people on the job site that he wanted to bring in the Local, he could do so," or, alternatively, "if he didn't have anybody that I had comparable people that I could get to him that would do the job." McKenzie denied flatly that Delcourt had said he wanted Respondent to abide by the Union's contract. However, other than agreeing that he had said that he would go to the Union's hall the next day, McKenzie never did describe with any particularity what he and Delcourt had said during that conversation.

On the following day, Friday, December 13, 1996, McKenzie did go to the Union's hall where he met with Delcourt, as well as with Laborers' agents Downs and John Hendricks. Neither of the latter testified in this proceeding, though there was neither representation nor evidence of their unavailability to appear as witnesses. McKenzie testified that he believed two other people and a secretary also had been present. But, he did not identify any of them by name.

In any event, McKenzie did not contest Delcourt's testimony, to the extent pertinent to this proceeding, that,

> I don't recall any comment from McKenzie at that time. I basically talked to him again and talked to him about the Carpenters, that he had a contract with us, that he needed to honor the contract. If he had carpenters that were in the field working that were competent to do that, he could bring them into the Local. That he had to pay the fringes on them and that if he did not—or also that I had carpenters that I could supply him that had done that type of work before.

According to Delcourt, McKenzie changed the subject by initiating discussion of Respondent's problems in the Lee County, Iowa area with Local 410 and its business representative, James S. Decker—which had given rise to the above-mentioned prior proceeding involving Respondent—but Delcourt said that "this was a different area" and, eventually, McKenzie said, testified Delcourt, "that he was not going to start the job in earnest until about the middle of January and that he would get with us and let us know what he was going to do."

Appearing as a witness, McKenzie was asked, more than once by Respondent's counsel, why he had chosen to bring up the subject of Local 410 and Decker, during discussion with the Union's agents. But, McKenzie, who appeared to understand what he was being asked, answered nonresponsively. His final nonresponsive answer was: "I wanted to get the thing resolved in a normal, civilized way. That's why at the very first meeting, I said, who is your boss, Paul, and he said, well, Dan O'Connell," agreeing that he wanted to work out a contract arrangement with the Union: "I wanted to make a friendly resolution between us."

As to Respondent's Lee County dispute with Local 410, in the prior case I concluded that Respondent had violated the Act by withdrawing recognition of Local 410, by repudiating its 1994–1997 collective-bargaining contract with Local 410 and refusing to continue honoring that contract's terms, by unlawfully discharging four employees, and by engaging in independent actions which constituted interference with, restraint and coercion of employees in the exercise of their statutorily protected rights. For the most part, the events underlying those conclusions had occurred during late 1995. However, the unfair labor practice hearing involving them had occurred from December 3 through 6, 1996, the week before Respondent commenced moving equipment and materials to the Crescent Bridge Sheer and, also, the week before McKenzie's above-described conversations with Delcourt. Thus, by December 12 and 13, 1996, those Lee County events had to be quite fresh in McKenzie's memory.

In connection with Respondent's by-then deteriorated relationship with Local 410, one more event occurred on December 13, 1996. By "TERMINATION LETTER" bearing that date, sent only to Decker of Local 410, McKenzie stated, in pertinent part, "BY THIS LETTER, MCKENZIE ENGINEERING CO. TERMINATES ANY AND ALL AGREEMENTS WITH CARPENTERS LOCAL 410 AND ITS AFFILIATES AS OF THE ABOVE DATE." So far as the evidence discloses, no copy of that letter, nor any similar to it, was sent to the Union, nor to Delcourt with whom, of course, McKenzie had met on that very date.

Delcourt testified that he returned to the Crescent Bridge on January 15, 1997, looking for McKenzie who had not contacted the Union as promised on the preceding December 13. The latter was not there. According to Delcourt, there were between three and five people working around one of the cells and he observed sheet piling being hooked to the pile driver handle work, which he regarded as belonging to the Union. He left a message with one of the workers, asking that McKenzie contact the Union.

When Delcourt heard nothing by January 23, 1997, he testified that he returned to the project. On that occasion, testified Delcourt, McKenzie again was not present and he again left a message, requesting that he be contacted by McKenzie. Although Delcourt gave no testimony about having spoken to McKenzie at the project during January 1997, McKenzie, questioned about the subject, acknowledged that he had spoken there with Delcourt and had agreed to come to the Union's hall to talk further with Delcourt. Interestingly, asked whether Delcourt had demanded on that occasion that Respondent abide by the Union's contract, McKenzie answered merely, "I don't believe he said that, no." In any event, McKenzie did come to the Union's hall on January 24, 1997.

Both men testified about what had been said on that occasion. Delcourt testified that McKenzie had said that he wanted to meet with Dan O'Connell, the Union's business manager, secretary-treasurer. According to Delcourt, McKenzie also said that, when he did meet with O'Connell, he would have copies of the brief, "pertaining to the Fort Madison [dispute] with Jim

Decker and the case that was going on down there and the scenario of how things happened," for O'Connell and Delcourt to read.

McKenzie provided a more detailed account of this conversation with Delcourt, though his overall account is not truly inconsistent with that, described in the preceding paragraph, of Delcourt. Having never before met the Union's by-then current officers, McKenzie testified that he had asked Delcourt, "Are you the top man?" When Delcourt responded in the negative, adding that "Dan O'Connell is," testified McKenzie, "I said, 'Well I want to talk to him.'" That would lead to a meeting between McKenzie and other officials of the Union, including O'Connell, on January 31, 1997.

With respect to the January 24 conversation about the situation at the Crescent Bridge Sheer and that going on in Lee County with Local 410, McKenzie allowed at one point that "you could interpret" what he had said as an expression of unwillingness to deal with the Union until the Lee County dispute with Local 410 was resolved. However, he testified that what he actually had said to Delcourt was,

> You know, I have really bitter feelings about what occurred between myself and Jim Decker and the Carpenters I had down at Keokuk, Iowa, and I have very bad feelings about a lot of lying that went on in the hearing—
>
> . . . .
>
> —at Fort Madison. So I said, "I am coming up here and I am just rip roaring mad," and I said, "Before I sign on anybody up here," I said, "I want to try to ferret this thing out with you Carpenters because," I said, you know, "I earn most of my living down in Keokuk, Burlington, Fort Madison, and I am not up here very much so this isn't the world's biggest step for me up here.

However, McKenzie then answered in the negative when asked more specifically if he had said that he did not want to deal with the Union in the Quad Cities until he had the Fort Madison situation resolved: "No, I said specifically—I said, 'Let's try to get this thing resolved,'" and, "I didn't say that at all, no. I said 'I want to deal with you. I want to get this thing resolved.'"

McKenzie testified that he had renewed that refrain during his meeting with the Union, including O'Connell, on January 31, 1997. Thus, asked if he had told O'Connell that Respondent did not want to deal with the Union until resolution of the Lee County, Iowa dispute occurred, McKenzie responded: "Nope. I said, 'Let's try to get Fort Madison resolved first," and, "Let's try to get this one figured out[.]" He agreed that he had shown O'Connell and Delcourt copies of the posthearing brief which Respondent was intending to file in that case. Even so, McKenzie did not deny that, during the January 31 meeting, the Union's officials had asserted that the Union had a contract with Respondent and wanted to get union-represented employees on the Sheer project, and had promised to try to accommodate Respondent's small-contractor status by working out more competitive journeyman-to-apprentice ratios or by freezing wages. Most significantly, McKenzie never disputed the testimony that, during that meeting, he had never denied assertions that Respondent was party to a collective-bargaining contract with the Union.

It appears to have been during that January 31 meeting that the subject of a project agreement arose, though Delcourt conceded that such an agreement may have been presented to McKenzie as early as December 13, 1996. McKenzie was unable to recall when, or even who, had presented him with such an agreement: "Specifically I don't know which one of the Carpenters gave it to me. There were various meetings with Paul Delcourt or his assistant." Nevertheless, he agreed that it had been handed to him at the Union's hall before February 5, 1997, and that when it had been given to him, he had been told that the Union "could live with a project only contract." He testified that, as he had never seen that type of contract before, he had said, "I'll have to go home and read it and check it and run it past my lawyer and everything."

That project agreement was presented during the hearing in this proceeding. Its printed portions, to the extent pertinent, contain a provision for recognition of the Union "as the sole and exclusive-bargaining agent for and on behalf of the employees of the Employer coming within the territorial and occupational jurisdiction of the Union," for observance by the employer of "the terms of the Trust Agreements of fringe benefit funds to which contributions are required to be made under the Agreements referred to in this Memorandum of Agreement," and for agreement by the employer and the Union "that all existing provisions of the current bargaining agreement will be in full effect for the duration of this Agreement, which will expire upon completion of the project named below." Of course, to the extent pertinent here, it is that final provision which distinguishes that project agreement from the memorandum agreement which McKenzie had executed during 1988. Respondent contends that proffer of such a project agreement is strong evidence from which to infer that even the Union had understood, as of December 1996 through January 1997, that Respondent was not bound to any existing contractual relationship for the Crescent Bridge Sheer project.

Another meeting took place on February 5, 1997. Present for the Union were Heartland Regional Council Business Representative Barry Pence and Heartland Regional Council Business Agent Bruce Werning. It was during this meeting that, for the first time, McKenzie was presented with a copy of the memorandum agreement which he had signed during 1988. The fact that the Union had not done so until so late in the dispute about work on the Sheer, argues Respondent, is further evidence that the Union had not been demanding prior to then that Respondent honor that contract. Asked about his reaction when it had been handed to him, McKenzie testified, "I didn't say a word," but merely "sort of look[ed] and [took] it, shove[d] it back." However, he did not describe more fully what had been said during that meeting. Consequently, he never disputed the accounts of Pence and Werning as to what had been said during it.

Werning testified that, during the February 5 meeting, McKenzie had renewed his complaints "about the 410 situation down there and the problems he's having there and at that time Barry Pence had showed him a copy of the contract that we have in our area and we wanted to deal with the problem at

hand in our area." According to Werning, McKenzie responded "that he thought that he could not work with us because of the impending [sic] case in the 410 area," and for "some reason, date of February 14th comes to mind, that that's when a decision was going to be coming about the impending [sic] case in the 410 area."[5] Werning testified that he and Pence had protested that they could not wait until February 14, since Respondent's project "was in progress" and, "We wanted to get our guys out working for him as soon as possible."

Similarly, Pence testified that when he had started the meeting by asking if Respondent would hire union-represented employees for the Crescent Bridge Sheer project, McKenzie had "said, no, he couldn't because of a pending lawsuit or labor relations charge in the Fort Madison area, that he didn't want to hire our carpenters. It would act like he was admitting that he had a contract with us." According to Pence, after being shown a copy of the memorandum agreement which he had executed, McKenzie had complained that "he was upset with Jim [Decker] for lying . . . in this lawsuit that was going on down in the Fort Madison area," and "also said that Jim Decker owed him an apology for all the things he was having to go through." Pence further testified that McKenzie mentioned February 14—either as a date for judgment on, or for settlement of, that case; Pence was not certain which McKenzie had said—and said that he "was wanting to wait to see the outcome of [that] before he would commit to using any of the carpenters from our Local." Pence testified that he replied that the Union would not wait and that he would have to report to O'Connell what had occurred during the meeting.

In fact, on the following day the Union initiated picketing at the project. By then, however, Respondent had taken what it appears to have believed would be a poison pill measure that would preempt any further dispute with the Union.

After leaving that meeting with Pence and Werning, testified McKenzie, "I had called Jack Schadt," business representative for Operating Engineers. At that time, Respondent was party to a "DREDGE MAINTENANCE AGREEMENT" with Operating Engineers. Schadt testified, "I had approached [McKenzie] to sign the dredging agreement addendum quite some time before" February 5, 1997. According to Schadt, dredging involves use of equipment for "removal of material from under water." He testified further that although the Dredge Maintenance Agreement covered work other than operation of power-driven equipment, the addendum "extends [that agreement] to allow other marine work," meaning work "other than dredging, which you call other work, which was not dredging." The addendum, testified Schadt, is "a one trade agreement," meaning that a signatory employer could assign all work on a project to employees represented by Operating Engineers.

All parties appear to have agreed that when Brennan had worked on the Crescent Railroad Bridge Sheer, its work had been performed by a composite crew, with some employees, equipment operators and those performing work incidental thereto, represented by Operating Engineers, while other employees had been represented by the Union. Moreover, it also appears uncontroverted that, prior to beginning work on that Sheer, Respondent had employed regularly at least one Operating Engineers-represented worker, Larry Dennison, who had been moved from project to project. In addition, Respondent had obtained referrals from Operating Engineers for other marine projects. Significantly, however, asked about other bridge-related work performed by Respondent, Schadt conceded, "not locally here or lately," and, further, "I can't remember when [it had] done another bridge job, sir."

Schadt also acknowledged having been aware as of February 5, 1997, that Respondent was having difficulties with the Carpenters. Nonetheless, when requested to do so, he presented a copy of the addendum to McKenzie who signed it on behalf of Respondent. "I said, Jack, will you come over to my house. I think I want to sign that addendum agreement because it's time," testified McKenzie. He agreed that, "[i]f need be," only employees represented by Operating Engineers would thereafter be able to work on the Sheer, without having to employ anyone represented by any other union.

In fact, that is how Respondent completed that project. It obtained one or two employees from Operating Engineers' hiring hall. It secured Operating Engineers' permits for the remaining employees who had been relocated to the Quad Cities from the Fort Madison, Iowa area. McKenzie notified Delcourt "that the operators could do all that work" and, by letter to Decker of Local 410 dated February 13, 1997, copies to Delcourt and to Pence, stated, inter alia, "that the December 13 letter was to terminate, *at their expiration dates*, any and all agreements between [Respondent], Local 410 and its affiliates, including the" Union.

II. DISCUSSION

The General Counsel and the Union contend that, in performing work from December 1996 to March 26, 1997, on the Crescent Railroad Bridge Sheer, Respondent had been obligated to honor and abide by the terms of the highway/heavy construction collective-bargaining contract between Associated General Contractors of Illinois and United Brotherhood of Carpenters and Joiners of America for the term of August 1, 1996 through July 31, 2001. Of course, it is indisputable that a party to a collective-bargaining contract—be it employer or union—"violated Section 8(a)(5) and (1) and Section 8(d) of the Act [or Section 8(b)(3), in the case of a union] whenever it fails to honor a collective-bargaining contract by applying its terms to all employees covered by that contract." (Citation omitted.) *Diversified Bank Installations*, 324 NLRB 457 (1997). That obligation exists no less to collective-bargaining contracts arising under Section 8(f) of the Act, id., as is the situation presented here.

Of course, to conclude that an employer or union violated the Act by failing and refusing to honor a collective-bargaining contract, the General Counsel must credibly establish that that employer or union had been party to the contract at issue—that there existed a contractual obligation which was not honored. Here, not only is there no evidence that Respondent had never executed that above-mentioned 1996–2001 highway/heavy contract, but the General Counsel and Union concede that Respondent had never executed it. Rather, they argue that Re-

[5] February 14, 1997, was the date for filing posthearing briefs in that case.

spondent had been absorbed as a party to that contract by virtue of the terms of the memorandum agreement executed almost a decade earlier by Robert J. McKenzie. Although conceding that McKenzie had executed that document, however, Respondent contends that his signature, alone, did not suffice to create a contractual relationship with the Union.

That contention rests upon essentially four facts. First, by the very terms of that memorandum agreement, signatures of two officers are required whenever the employer is a corporation and only McKenzie had signed for Respondent. Second, at the time that he signed it, there was no signature on it for the Union and the individual whose seemingly stamped signature now appears on the memorandum agreement was never called to authenticate when his signature had been stamped on the memorandum agreement executed by McKenzie. Third, while the date "this 27 day of June, 1988," now appears on it, it is undisputed that no date had been inserted on the memorandum when McKenzie had executed it. Finally, no copy of that memorandum agreement, with the date and with Jacobsen's stamped signature, had ever been provided to Respondent.

In some situations some or all or those facts might operate to prevent formation of a contract. But, the memorandum agreement executed by McKenzie is not an ordinary contract. It is a collective-bargaining contract. Such contracts are evaluated in the light of an "established federal labor policy favoring collective bargaining," *NLRB v. Boston District Council of Carpenters*, 80 F.3d 662, 665 (1st Cir. 1996), with one consequence being that collective-bargaining contracts are not "governed by the same old common-law concepts[ ] which control . . . private contracts." (Citations omitted.) *Transport Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160–161 (1966).

Respondent has pointed to no authority holding that, under the Act, stamped signatures are inherently insufficient for a collective-bargaining contract to be valid. Indeed, such a holding would seemingly be at odds with the by-now relatively common practice of utilizing facsimile signatures on documents, even on paychecks and, in fact, on the Board's own subpoenas.

Nor is authority cited for a proposition that, for a collective-bargaining contract to be valid, a union must execute it before or, even, at the same time as the employer does so. To the contrary, it has become fairly common practice for one party to execute a newly negotiated collective-bargaining contract, after which it is transmitted to the other party or parties for signature. Similarly, the fact that McKenzie executed an undated memorandum agreement hardly, of itself, relieved Respondent of an obligation to honor it. After all, he filled in other blanks on that agreement and, so far as the record discloses, nothing prevented him from filling in the date, as well.

The actual problem here, of course, is ascertaining whether the date of June 27, 1988, truly reflected when the memorandum agreement had been executed by the Union—more specifically, had been stamped with Jacobsen's signature—or whether that signature had been added much later, perhaps not until the Crescent Railroad Bridge Sheer project dispute arose. Certainly, Respondent correctly argues that there has been neither representation nor evidence that Jacobsen was not available as a witness, had the General Counsel or the Union wanted to call him to testify about when and how his signature came to be stamped on the memorandum agreement executed by McKenzie.

Even so, there is one other set of facts which tend to establish that, in fact, McKenzie had executed the memorandum agreement during June 1988, notwithstanding his professed inability to recall exactly when he had done so. For that month, and for the following month, of that year, Respondent paid benefits contributions on behalf of employees for work performed in the geographic area encompassed by the memorandum agreement's enumeration of Illinois and Iowa counties. Obviously, it was within Respondent's power and control to show that those contributions had been made pursuant to some other collective-bargaining contract, had that been the fact. Respondent's failure to make such a showing, in the face of a memorandum agreement executed by its owner and president, would seem to establish conclusively that McKenzie had executed the memorandum agreement during June 1988, albeit perhaps not on June 27 of that month.

Furthermore, the fact that Respondent did honor the memorandum agreement and its incorporated contracts is evidence that, in fact, it had regarded itself as bound by the agreement which McKenzie had executed, regardless of whatever games he had been trying to play at the time: "I delayed signing it until then and then we were done and then I made certain that it was not made into a contract because I made sure [Assistant Secretary] Beverly Austin didn't sign the contract," to avoid "mak[ing] it a legal document."

Whether or not Jacobsen's signature stamp had been affixed to the memorandum agreement executed by McKenzie, upon its receipt from him, is not truly dispositive of the question of the Union's acceptance of that collective-bargaining contract. Respondent's mid-1988 benefits contributions were accepted. Obviously, that would not have occurred had a contractual relationship not been established at the time of their receipt. Beyond that, in Section 8(d) of the Act Congress distinguished the concept of "agreement" from the obligation to "execut[e] a written contract incorporating any agreement reached." In consequence, even had Jacobsen's signature not been stamped on the agreement at the time of its receipt, or shortly afterward, the Union clearly regarded Respondent as bound to the terms of that memorandum agreement and its incorporated contracts. Any focus on the point at which the signature had been stamped on the memorandum agreement, in the circumstances, would be to elevate "the same old common-law concepts" applicable to private contracts, id., over "established federal labor policy favoring collective bargaining." Id. Moreover, if the Union was willing to accept that memorandum agreement with only signature for Respondent, then it certainly was free to do so.

Therefore, I conclude that a preponderance of the credible evidence establishes that Respondent did become party to a collective-bargaining contract by having executed the memorandum agreement during June 1988. Of course, an affirmative answer to that question does not, of itself, resolve the extent of any ongoing obligation arising as a result of that initial obligation.

To the extent pertinent here, the extent of the obligation to which Respondent became bound, as a result of McKenzie's

mid-1988 execution of the memorandum agreement, seems resolved by the terms of that agreement. For, it states, inter alia, that Respondent agrees "to be bound by Area Agreements negotiated between the [Union] and various Employer Associations . . . from time to time thereafter unless the EMPLOYER gives written notice to the UNION of a desire to amend or terminate any of such Agreements at least three (3) calendar months prior to the expiration of such Agreement or Agreements."

At first blush, it might appear a somewhat onerous result to conclude that a contractual obligation continued to exist, based on no more than one-time execution of a memorandum agreement in connection with a single short-term project performed more than eight years earlier—that is, to conclude that an ongoing contractual relationship existed because of one-time execution of what might be viewed as a "drive-by" collective-bargaining contract, to adopt a phrase utilized in a different context. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But, there is more at stake in the circumstances presented here.

As pointed out above, Federal labor policy favors collective bargaining and, in consequence, contracts arising as a result of that process are not governed by common law contractual concepts. As a matter of public policy, "parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." (Citation omitted.) *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983). Even as to collective-bargaining relationships arising under Section 8(f) of the Act, it is accepted that where an employer executes a contract which binds it to renewals and to successive contracts, that employer is statutorily obligated to honor those renewals and successive contracts. *Cedar Valley Corp*., 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993). Thus, the fact that an employer executes a collective-bargaining contract in connection with a single, short-term project does not relieve it of a duty of honor that contract on other projects which come to be encompassed by it.

Of course, such a result might be intolerable, as a matter of public policy, were an employer-signatory to such a contract to be bound interminably, in perpetuity, to renewals and successive contracts. However, that is not the fact here. To prevent renewals and incorporation of successive contracts, Respondent need only have "give[n] written notice to the UNION of a desire to amend or terminate any of such Agreements at least three (3) calendar months prior to the expiration of such Agreement or Agreements." Respondent has presented no evidence that it ever has availed itself of that provision and there is no evidence that it ever had done so before December 1996, when it began moving materials and equipment to the Crescent Railroad Bridge Sheer, to commence its project there. Having failed to pursue so seemingly simple a course to prevent an ongoing contractual relationship with the Union, Respondent is in a poor position to claim that it should not be statutorily obligated to do that which Section 8(d) of the Act obliges it to do: "honor[ing] a collective-bargaining contract by applying its terms to all employees covered by that contract." (Citation omitted.) *Diversified Bank Installations,* supra.

In an effort to create, in effect, a daisy chain of contracts from 1988 through July 31, 2001, the General Counsel presented four Highway/Heavy Construction collective-bargaining contracts between the Associated General Contractors of Illinois and the United Brotherhood of Carpenters and Joiners of America. Respondent points out, accurately, that the ones for August 1, 1988 to July 31, 1991, and for August 1, 1991 to July 31, 1996 are unsigned. Obviously, those contracts would have been better authenticated by presentation of ones which had been signed. Nonetheless, Pence testified that, before having become a business representative during approximately 1993, he had been employed as a carpenter and had performed that work under, inter alia, the terms of those 1988 to 1991 and 1991 to 1996 Highway/Heavy Construction contracts. "Testimony that a matter is what it is claimed to be" is one statutorily prescribed method of authentication. Fed.R.Evid. Rule 901(b)(1).

Beyond that, in reality, the 1988 to 1991 and 1991 to 1996 contracts are collateral to the dispute encompassed by the complaint in the instant matter. An executed copy of the 1996–2001 Highway/Heavy Construction collective-bargaining contract was presented. Not only is it the current contract, but it is the one which, it is argued, applies to Respondent's work on the Crescent Railroad Bridge Sheer. Under the memorandum agreement which McKenzie executed, that 1996–2001 contract is literally a "successive agreement[ ]" to the 1985–1988 one, for which an executed copy was provided, in effect when Respondent became a party to the memorandum agreement. Even had there been a total hiatus between those two executed highway/heavy construction contracts—for example, as the result of strike which occasioned a contractual hiatus from August 1, 1988, to July 31, 1996—that would not seemingly have precluded the 1996–2001 contract from being a "successive agreement[ ]" to the 1985–1988 one in effect when Respondent became a party to it.

To be sure, there is no evidence that Respondent had honored any highway/heavy construction collective-bargaining contract between August 1988 and December 1996. Yet, as quoted in section I above, McKenzie testified that most of Respondent's work is in the Fort Madison area, in Lee County, Iowa. There is no particularized evidence that, during that somewhat more than 8-year period, Respondent had performed any work in any of the Illinois and Iowa counties listed in the memorandum agreement which McKenzie had executed. If there had been no opportunity to apply the terms of highway/heavy construction contracts during that period, because Respondent had performed no work in counties encompassed by the memorandum agreement, then it hardly can be argued persuasively that a failure to honor such contracts during that period somehow shows union-acquiescence to the proposition that no such contract applied to Respondent once it completed the projects in Bellevue, Iowa and in Marseilles, Illinois, much less that no contract had ever existed, at all.

Beyond that, even if Respondent had slipped into one or more of those Illinois and Iowa counties, there performing projects without having honored a then-in-effect highway/heavy construction collective-bargaining contract, that hardly establishes a concession by the Union that Respondent was thereaf-

ter no longer obliged to honor highway/heavy construction contracts. For, as pointed out in *Diversified Bank Installations,* supra, at 466:

> the Board has held that a union's past acquiescence to an employer's failure to honor contract terms does not, under Section 8(d) of the Act, operate to obliterate an employer's statutory obligation not to terminate or modify contract terms during the existence of a collective-bargaining contract. [Citations omitted.]

"In *Cedar Valley* [supra] the Board adopted the judge's decision that the employer was bound to an 8(f) contract by virtue of an automatic renewal clause to which it had agreed with various unions, despite the fact that the employer had not complied with the subsequent agreements for a significant number of years." *Neosho Construction Co.*, 305 NLRB 100 fn. 1 (1991).

Of course, where one party is unaware of another party's nonobservance of the terms of a collective-bargaining contract, there is no basis for concluding that, because of that noncompliance, there had been a waiver of the statutory obligation to do so in the future. Absent a showing of knowledge, there can be no waiver under the Act. *Diversified Bank Installations,* supra, and cases cited therein. In the instant case, Respondent has made no showing that the Union had been aware of any project on which Respondent had worked within the Illinois and Iowa counties listed in the memorandum agreement, which McKenzie executed. Nor can a showing of such awareness be found or inferred from the record.

Given the totality of the foregoing considerations, the conclusion is warranted that, pursuant to the memorandum agreement which its owner and president executed and honored during mid-1988, and which there is no basis for concluding was ever terminated prior to December 1996, Respondent was obligated to continue honoring its collective-bargaining contract—the Highway/Heavy Construction collective-bargaining contract for 1996 to 2001—at the time of commencing work on the Crescent Railroad Bridge Sheer project. Nevertheless, Respondent advances other arguments in opposition to such a conclusion.

First, it denies that the Union initially had asserted that it had a collective-bargaining contract with Respondent and, in that regard, points out that the Union never presented McKenzie with a copy of his executed memorandum agreement until February 5, 1997. However, Respondent had pointed to no authority, nor have I been able to locate any, holding that to perfect a demand for contract compliance under the Act, the statutory bargaining agent must present a signatory employer with a copy of the collective-bargaining contract executed by the latter, in support of each demand for compliance with it.

Beyond that, McKenzie denied with specificity having been told that Respondent was bound by a contract only with regard to his encounter with Delcourt on December 12, 1996. As to like assertions by the Union during subsequent encounters between the parties, McKenzie mustered merely a "I don't believe he said that, no." At best, such testimony shows a lack of recollection which "hardly qualifies as a refutation of . . . positive testimony and unquestionably was not enough to create an issue of fact between" McKenzie and the Union's agents. *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 425 (4th Cir. 1981). I credit the testimony, which appeared to have been advanced credibly and which is consistent with the objective fact that Respondent was party to contracts incorporated by the memorandum agreement, that the Union's agents did claim to McKenzie, beginning in mid-December 1996, that Respondent had a contract with the Union.

Actually, I have no doubt that, prior to the meeting with Delcourt and Laborers agent Downs on December 12, 1996, McKenzie probably not given any thought to the memorandum agreement's effect on the Crescent Railroad Bridge Sheer project. Of itself, of course, lack of forethought about a collective-bargaining contract's application to a particular project hardly defeats its actual application to that project. Moreover, when testifying, McKenzie impressed me as an intelligent and meticulous individual. I have no doubt that, while he may not have anticipated application of the memorandum agreement to the Sheer project, and may not even have recalled having executed it at the time that Delcourt first raised the subject, McKenzie afterward had taken the time to ascertain what Delcourt was talking about and, by the time of their subsequent meetings, had ascertained the basis for the Union's ongoing assertions of contractual obligation.

Indeed, a review of the testimony about what had been said during the meeting on December 13, 1996, and during subsequent meetings, reveals that McKenzie pretty much ceased disputing Respondent's obligation to honor the 1996–2001 Highway/Heavy Construction collective-bargaining contract and, instead, conditioned Respondent's willingness to honor that contract on resolution of Respondent's dispute with Local 410 in Lee County, Iowa. In short, McKenzie utilized compliance with Respondent's contractual obligations pursuant to the then-not terminated memorandum agreement, and its incorporated contracts, as some sort of lever to resolve Respondent's separate dispute with Local 410. Under the Act, however, that is not an acceptable procedure.

Second, Respondent challenges the assertedly leisurely pace at which the Union pursued its contract rights on the Sheer project. Yet, McKenzie did not contest the testimony that on December 13, 1996, he had told Delcourt "that he was not going to start the job in earnest until about the middle of January and that he would get with us and let us know what he was going to do." It is difficult to ascertain the basis upon which the Union now should somehow be faulted for believing that McKenzie would keep his word—for having waited until mid-January 1997, to try contacting McKenzie.

When it became obvious by January 15, 1997, that McKenzie might not "get with" the Union, Delcourt again went to the project, on that day and, again, a week and 1 day later, to try speaking with McKenzie. Moreover, the Union participated in meetings with McKenzie on January 24 and, once more, on January 31, 1997. These facts do not suffice to establish some type of indolent pursuit by the Union of its contract rights with Respondent, much less an indolence which, on some unstated basis, might serve to deprive the Union of its rights under the memorandum agreement and its incorporated collective-bargaining contracts.

Third, much is made by Respondent of the project agreement concededly presented to McKenzie. Yet, so far as can be ascertained from the record, that did not occur until January 31, 1997. By then, McKenzie had already resisted honoring the 1996–2001 Highway/Heavy Construction contract until his dispute with Local 410 was resolved—an eventuality unlikely to occur until at least February 14, 1997, if then. Respondent's project on the Sheer was a relatively short-term one. It had been in progress for over a month by the end of January 1997. Respondent was a relatively small contractor which, so far as the record discloses, did not ordinarily work in the Illinois and Iowa counties enumerated in the memorandum agreement which McKenzie had executed. Given all these facts, it was neither inconsistent with its existing contract rights, nor unreasonable, for the Union to attempt some efforts at a quick settlement of the dispute before the project was completed and the Union-represented employees lost out altogether.

Proffer of a project agreement appears to have been but one means adopted by the Union for accomplishing that objective. Business Manager, Secretary-Treasurer O'Connell had been willing to meet with McKenzie. Decker had been brought up from Lee County to participate in one meeting with McKenzie. It is uncontroverted that the Union offered to help Respondent by adjusting journeyman-to-apprentice ratios and by freezing wages. In the circumstances, proffer of a project agreement appears to have constituted no more than another avenue driven down by the Union in an effort to reach the destination of a possible quick settlement before the Sheer project was completed.

It would not be consistent with the policies and purposes of the Act to hold against a party on the merits, merely because that party advanced less than entitled on the merits in an effort to resolve the underlying dispute. Indeed, such use of a compromise offer would appear to be contrary to general policy, not simply to that under the Act. See Fed.R.Evid. Rule 408. In fact, Respondent has offered no evidence that, in offering a project agreement, any of the Union's agents had said that it was being offered as a permanent substitute for the contracts incorporated by the memorandum agreement, thereby waiving all existing and future rights under the 1996–2001 Highway/Heavy Construction collective-bargaining contract. Yet, seemingly such a specific offer would have been required to reach a conclusion that the Union had been willing to relinquish all right under the latter in return for Respondent's execution of the proffered project agreement on the Sheer project. *Diversified Bank Installations,* supra.

In sum, I conclude that the Union's proffer of a project agreement does not establish either inconsistency with a claim that Respondent was bound by an existing collective-bargaining contract with the Union, or that the Union waived those contract rights. In any event, Respondent never executed the project agreement, with the result that it lost any opportunity to test its effects on its existing obligation to honor the memorandum agreement.

Finally, Respondent's parting shot at the Union was the execution of the addendum with Operating Engineers which, Respondent then claimed, gave rise to a jurisdictional dispute. But, that addendum had not been signed until February 5, 1997—well after Respondent had commenced work on the Sheer and, also, well after the Union already had laid claim to work on that project. Obviously, parties cannot simply erase an unlawful refusal to honor a collective-bargaining contract through the device of executing a separate contract with another labor organization and, then, claiming that there is a jurisdictional dispute. Such an approach would undermine altogether the statutory duty to honor collective-bargaining contracts and, as well, the federal labor policy favoring collective bargaining. Consequently, the Union's contractual claim to some of the work on the Crescent Railroad Bridge Sheer project is not nullified, nor diminished, by its unwillingness to submit the dispute, arising because of Respondent's belated execution of the addendum with Operating Engineers, to jurisdictional disputes resolution procedures. Execution of that addendum constituted "no more than a very thinly-disguised attempt by Respondent to avoid its collective-bargaining contract with the Union."

As to the extent of Respondent's obligation to honor its collective-bargaining contract with the Union at that project, it seems undisputed that work there involving power equipment operation—boats, cranes, etc.—was not work ordinarily performed by employees represented by the Union and covered by its contract with Respondent. In fact, the Union never laid claim to representation of employees, such as Larry Dennison, who were performing that work. On the other hand, both under the Highway/Heavy Construction collective-bargaining contract and under Brennan's practice during past rehabilitation on the Sheer, employees represented by the Union would perform work there which did not involve operation of power equipment and tasks incidental thereto. That, for example, would include such work as placing fence timbers in position and connecting them to each other.

Fabrication of cells was something different at the Sheer. So, too, was erection of the steel structure on its downstream side. The Union contends that work connected with those operations is encompassed by the 1996–2001 Highway/Heavy Construction collective-bargaining contract. A reading of that contract's work jurisdiction provisions, quoted in section I, supra, would appear to support that contention. To be sure, employees represented by Operating Engineers and, perhaps, by other labor organizations, as well, also could perform some, maybe all of that work. Nevertheless, so far as the evidence reveals, only the Union had a collective-bargaining contract in place when Respondent commenced work at the Sheer. If, however, it is determined during the compliance phase of this proceeding, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984), that a particular task or tasks is not encompassed by the Union's contract with Respondent, then the remedy can be tailored to accommodate that determination.

CONCLUSION OF LAW

McKenzie Engineering Co. has committed unfair labor practices affecting commerce by failing and refusing to honor its collective-bargaining contract with Northwest Illinois and Eastern Iowa District Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, a statutory labor organization, as the exclusive collective-bargaining representative of all employees employed

within the territorial and occupational jurisdiction of that labor organization, as described in the memorandum agreement executed by McKenzie Engineering Co. during 1988 and in the collective-bargaining contracts which it incorporates by reference, in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having concluded that McKenzie Engineering Co. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to recognize and bargain with Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO during the remaining term of the memorandum agreement which McKenzie Engineering Co. executed during 1988, its incorporated collective-bargaining contracts and, absent timely and sufficient notice effectively canceling that collective-bargaining contract, any automatic renewals or extensions thereof, and, during that remaining term, honor and abide by all contract terms for all employees in the appropriate historic bargaining unit of: All employees of McKenzie Engineering Co. employed within the territorial and occupational jurisdiction of Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, in the Illinois and Iowa counties listed in the memorandum agreement executed during 1988.

It shall also be ordered to make whole all employees represented by Northwest Illinois and Eastern Iowa District Council of Carpenters, affiliated with the International Brotherhood Carpenters and Joiners of America, AFL–CIO who should have been assigned work on the Crescent Railroad Bridge Sheer project between mid-December 1996 and March 26, 1997, pursuant to the terms of the above-mentioned memorandum agreement and its incorporated collective-bargaining contracts and, in addition, Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, for any losses suffered as a result of the unlawful failure to comply with those contractual obligations on that project, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, McKenzie Engineering Co. shall be ordered to make whole the appropriate fringe benefit funds for losses suffered as a result of its delinquencies in failing to make contractually required contributions to those funds. *Diversified Bank Installations,* supra.

In addition, inasmuch as the project giving rise to this dispute has been concluded, but others may be undertaken within the geographic area encompassed by the above-identified memorandum agreement and its incorporated contracts, renewals and extensions, McKenzie Engineering Co. shall be ordered to sign and return to the Regional Director for Region 33 sufficient copies of the notice for posting by Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, it being willing, at all locations where notices to its members are customarily posted.

On these findings of fact and conclusions of law, and on the entire record, I make the following recommended[6]

ORDER

The Respondent, McKenzie Engineering Co., Fort Madison, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) During the term of the memorandum agreement executed in 1988 and collective-bargaining contracts which it incorporates by reference, including, absent timely and sufficient notice effectively canceling such obligation, any automatic renewals or extensions, withdrawing recognition from, and refusing to bargain with, Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive collective-bargaining representative of all employees in an appropriate historic bargaining unit of:

> All employees of McKenzie Engineering Co. employed within the territorial and occupational jurisdiction of Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, in the Illinois counties of Boone, Bureau, Carroll, DeKalb, Henderson, Henry, Jo Daviess, La Salle, Lee, Marshall, Mercer, Ogle, Putnam, Rock Island, Stark, Stephenson, Whiteside and Winnebago, and the Iowa counties of Allamakee, Appanoose, Benton, Cedar, Clayton, Clinton, Davis, Delaware, Dubuque, Iowa, Jackson, Jefferson, Johnson, Jones, Keokuk, Linn, Louisa north of the Iowa River, Mahaska, Monroe, Muscatine, Scott, Van Buren, Wapello, Washington and Wayne; excluding office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

(b) Repudiating the memorandum agreement and its incorporated collective-bargaining contracts, specified in subparagraph (a) above, including any renewals and extensions thereof, absent timely and sufficient notice effectively canceling such obligations, and refusing and failing to comply with all contract terms for all employees in the above-described appropriate historic bargaining unit during the contractual term.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) During the term of the memorandum agreement and its incorporated collective-bargaining contracts, specified in paragraph 1(a) above, including any extensions and renewals thereof, absent timely and sufficient notice effectively canceling such obligation, recognize and bargain with Heartland Regional Council of Carpenters, affiliated with the International

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive collective-bargaining representative of all employees in the appropriate historic bargaining unit described in that same paragraph.

(b) Honor all terms of the memorandum agreement and its incorporated collective-bargaining contracts, specified in paragraph 1(a) above, including any extensions and renewals thereof, absent timely and sufficient notice effectively canceling such obligation, and comply with all contract terms for all employees in the appropriate historic bargaining unit described in that same paragraph.

(c) Make whole all employees, Heartland Regional Council of Carpenters, affiliated with International Brotherhood of Carpenters and Joiners of America, AFL–CIO, and fringe benefit funds, in the manner set forth in the Remedy section, for any losses they may have suffered as a result of the failure to adhere to the memorandum agreement and its incorporated collective-bargaining contracts, as specified in paragraph 1(a) above, including any renewals or extensions thereof, for work performed on the Crescent Railroad Bridge Sheer, on the Mississippi River between Rock Island County, Illinois and Scott County, Iowa, between December 9, 1996 and March 26, 1997, with interest on amounts owing.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Fort Madison, Iowa place of business copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by its duly authorized representative, shall be posted by McKenzie Engineering Co. and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, McKenzie Engineering Co. has gone out of business, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since December 9, 1996.

(f) Within 14 days after service by the Regional Director for Region 33, sign and return to the Regional Director sufficient copies of the notice for posting by Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, it being willing, at all locations where notices to its members are customarily posted.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT, during the term of the memorandum agreement which we executed in 1988 and any collective-bargaining contract which it incorporates—including, absent timely and sufficient notice effectively canceling such obligation, renewals and extensions thereof—withdraw recognition from, and refuse to bargain with, Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, as the exclusive collective-bargaining representative of all employees in the following appropriate historic bargaining unit:

> All employees of McKenzie Engineering Co. employed within the territorial and occupational jurisdiction of Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, in the Illinois counties of Boone, Bureau, Carroll, DeKalb, Henderson, Henry, Jo Daviess, La Salle, Lee, Marshall, Mercer, Ogle, Putnam, Rock Island, Stark, Stephenson, Whiteside, and Winnebago, and the Iowa counties of Allamakee, Appanoose, Benton, Cedar, Clayton, Clinton, Davis, Delaware, Dubuque, Iowa, Jackson, Jefferson, Johnson, Jones, Keokuk, Linn, Louisa north of the Iowa River, Mahaska, Monroe, Muscatine, Scott, Van Buren, Wapello, Washington and Wayne; excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT repudiate the above-specified memorandum agreement and its incorporated collective-bargaining contracts —including, absent timely and sufficient notice effectively canceling such obligation, renewals and extensions thereof— and WE WILL NOT refuse and fail to comply with contract terms for all employees in the appropriate historic bargaining unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, during the term of the above-specified memorandum agreement and its incorporated collective-bargaining contracts—including, absent timely and sufficient notice effectively canceling such obligation, renewals and extensions thereof—recognize and bargain with Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO as the exclusive collective-bargaining representative of all employees in the above-described appropriate historic bargaining unit.

WE WILL, absent timely and sufficient notice effectively canceling such obligation, honor the terms of the above-specified memorandum agreement and its incorporated collective-bargaining contracts, including any renewals or extensions thereof, and WE WILL comply with all contract terms for all employees in the above-described appropriate historic bargaining unit.

WE WILL make whole all employees, Heartland Regional Council of Carpenters, affiliated with the International Brotherhood of Carpenters and Joiners of America, AFL–CIO, and fringe benefit funds for any losses suffered as a result of our failure to comply with the above-specified memorandum of agreement, its incorporated collective-bargaining contracts, and renewals and extensions thereof, for work which we performed between December 9, 1996, and March 26, 1997 on the Crescent Railroad Bridge Sheer, with interest on amounts owing.

MCKENZIE ENGINEERING COMPANY